

IN THE UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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:
UNIVERSAL CITY STUDIOS, INC., :
Plaintiff, :
:
vs. :
:
NINTENDO, CO., LTD. and :
NINTENDO OF AMERICA, INC., :
Defendants. :
:
- - - - - x

82 CIV. 4259 (RWS)

November 9, 1984

DEPOSITION OF ARNOLD C. GREENBERG

A p p e a r a n c e s :

For the Plaintiff:

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For the Defendants:

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1 Q Do you recall whether or not you met from counsel
2 from Nintendo and discussed the contents of this affidavit
3 prior to the time that it was actually executed by you?

4 A Yes, I believe I did, and also I met extensively
5 with Michael Schwefel, general counsel of the company in
6 connection with the affidavit.

7 Q You carefully reviewed the affidavit, I assume,
8 before you swore to its truth?

9 A Yes, I did.

10 Q Now, Mr. Greenberg, prior to January 1, 1982
11 were there, to your knowledge, any actual commercial
12 relationships between MCA/Universal City Studios and Coleco
13 Industries?

14 A Prior to January 1, 1982?

15 Q Yes.

16 A I believe there were. We have, over a period of
17 years, negotiated and done business with MCA/Universal on
18 licenses even before we entered the video business.
19 I believe we've done some business even since this dispute
20 has arisen.

21 Q To your knowledge was Coleco, through any of its
22 officers and employees, having discussions with representatives
23 of MCA/Universal with respect to possible relations relating
24 to video games during the fall of 1981?

25 A Yes, I believe we were. I'm not certain of the

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1 precise date, but I know that during that general period of
2 time we were talking to MCA/Universal and other companies
3 about licensing video software.

4 Q During the fall of 1981 did Mr. Al Kahn work for
5 Coleco?

6 A Yes.

7 Q Can you recall what his job function was at that
8 time?

9 A Functionally, he was the head of marketing activity
10 for the company, which would also include the acquisition of
11 properties of the kind that MCA/Universal owned.

12 Q So, it would be his responsibility to see whether
13 or not licenses could be obtained for various properties owned
14 by MCA/Universal?

15 A That is correct.

16 Q Do you know Mr. Steve Adler?

17 A Yes.

18 Q Who is he?

19 A To my knowledge he was employed by MCA/Universal
20 in their Licensing Department authorized to negotiate with
21 companies like Coleco for the licensing of properties.

22 Q Have you ever met him personally?

23 A Yes.

24 Q Have you met him more than once?

25 A Yes.

1 Q Had you met him in 1981?

2 A I don't recall having met him in 1981.

3 Q When was the first time to the best of your
4 recollection you recall meeting him?

5 A The first face-to-face I recall was at a meeting
6 I attended in California at MCA/Universal in late April.
7 I had had conversations with him prior thereto, however.

8 Q When you say in late April, 1982?

9 A Eighty-two, yes.

10 Q Was that an occasion you met Mr. Adler in any
11 way connected with a luncheon meeting you had with Messrs.
12 Sidney Sheinberg and Lou Wasserman?

13 A Yes, that was the same meeting.

14 Q Was Mr. Adler present at that luncheon?

15 A Yes, my recollection is he was.

16 Q Were you the only representative of Coleco who was
17 present at that luncheon?

18 A Yes, I believe so.

19 Q Where was the luncheon held?

20 A It was held at Universal City, the offices of MCA/
21 Universal in Southern California.

22 Q Was your meeting with the gentlemen from MCA/
23 Universal confined to lunch, or was it an all-day meeting or
24 partial-day meeting in which lunch was only an aspect?

25 A Lunch was an aspect. It was a meeting for several

1 hours, not overly lengthy. Lunch was incidental to the
2 business.

3 Q Prior to lunch tell me as best you can who you had
4 met with from Universal that day. Rather than saying MCA/
5 Universal, I mean encompassing MCA and Universal together.

6 A Prior to actually going over to the studio
7 commissary, I met and talked to Sid Sheinberg, Lou Wasserman,
8 Steve Adler and, I believe, Steve's boss was there who was
9 a senior man in Licensing. I don't recall his name.

10 Q Can you tell me as best you can in your own
11 words what led to your being on the West Coast and having
12 the meeting with these various MCA/Universal officials?

13 A There were two primary purposes. One was to pursue
14 prior discussions that had been held between Al Kahn and
15 Steve Adler concerning a proposal whereby Coleco would
16 license from Universal software properties which we would
17 adapt for video game systems.

18 The second purpose was to pursue what Steve Adler
19 had suggested to me in a telephone call, namely, that
20 Universal was interested in making a financial investment in
21 Coleco of one kind or another.

22 So, those were the two purposes on my agenda.

23 Q Let me show you what has been marked for
24 identification as Plaintiff's Exhibit 200, which is a letter
25 identified by Mr. Schwefel yesterday on Coleco Industries

1 letterhead from Al Kahn to Steve Adler at MCA. Let me ask
2 you if you've seen that letter before?

3 A Yes.

4 Q Had you seen that letter prior to the time that
5 Mr. Kahn sent it to Mr. Adler?

6 A Yes, I reviewed its contents with Mr. Kahn
7 before it was sent out.

8 Q That letter makes a formal proposal to MCA?

9 A Yes.

10 Q You approved that proposal, and Mr. Kahn made it,
11 is that correct?

12 A Yes.

13 Q Prior to the April 27th meeting with the senior
14 officers and others at MCA/Universal had you during the
15 course of 1982 personally had discussions with any
16 MCA/Universal people about any subject relating to video
17 games or any possible Universal investment in Coleco?

18 A You're saying prior to the meeting of April 27th?

19 Q Yes.

20 A My only discussions with anyone were with Steve
21 Adler. I had one or more telephone discussions with him
22 during the 30 days prior to the April 27th meeting,
23 primarily with a view toward arranging a date .

24 I might add being encouraged by Steve to come out,
25 I myself was somewhat hesitant to come out and uncertain as

1 to the need to come out in view of the fact that Al Kahn was
2 obviously thoroughly authorized.

3 I had the intriguing element for my coming out
4 was Steve's suggestion that there were more things that
5 Universal had to talk about than merely the video licensing
6 agreement. I did not know whether that meant a capital
7 investment in Coleco, or an acquisition in Coleco; but
8 needless to say, that excited my curiosity.

9 Q Mr. Greenberg, during the first four months of
10 1982 were the Coleco plans to introduce ColecoVision a matter
11 of public knowledge?

12 A Oh, yes.

13 MR. FAIRHURST: Objection.

14 BY MR. KIRBY:

15 Q Was Coleco actually selling ColecoVision during that
16 period taking orders from the trade?

17 A Yes, we were taking orders from the trade.

18 MR. FAIRHURST: Would you have the question
19 read back?

20 (Whereupon, the question was read back by the
21 Court Reporter.)

22 MR. KIRBY: The first four months of 1982.

23 MR. FAIRHURST: Thank you for repeating that.

24 BY MR. KIRBY:

25 Q Was Coleco's introduction of ColecoVision the

1 subject of any commentary by the press during this period?

2 A Yes.

3 Q In your conversations with Steve Adler prior to the
4 April meeting did you and he discuss the progress of the
5 introduction of ColecoVision?

6 A Not to a significant extent. Those discussions
7 were held by Al Kahn.

8 Q In your affidavit, Mr. Greenberg, Defendants'
9 Exhibit 124, there is a description of the luncheon as to
10 which you are now testifying that begins in paragraph five
11 and continues in paragraph six.

12 This is, obviously, a very brief description.
13 How long did that luncheon last?

14 A If I may go off the record for a moment.

15 (Whereupon, a short recess was taken.)

16 (Whereupon, the Court Reporter read back the
17 last question.)

18 THE WITNESS: The luncheon, together with the
19 meetings before and after, extended for approximately
20 two, two and a half hours.

21 BY MR. KIRBY:

22 Q During the entire two and a half hours were all of
23 the MCA/Universal personnel present, or were some of them
24 only there for part of the time?

25 MR. SELTZER: Mr. Kirby, I think before we

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to Donkey Kong, why do we have to get into those?

MR. KIRBY: No, you can't. I'm interested in everything that happened because we have elicited testimony about the overall relationships between MCA/Universal and Coleco; and I regard all of that as highly relevant.

THE WITNESS: During this period I commented on a history and description of Coleco at the request of Mr. Sheinberg who was eager to hear more about us.

I commented, at great length, as to the origins of the company, and what our outlook was; and, in particular, what our interests were in the video home computer marketplace, and talked about the progress we had made in recent months, and the very positive trade reception we had received to our ColecoVision product.

At some point at this time we were at lunch he interjected and commented on the video, and mentioned that he recently had seen a standup or coin-operated version of the Donkey Kong game, and thought it might be quite similar to the properties that they owned; namely, King Kong.

He was very interested in our use of the Donkey Kong license, both video and tabletop, and asked if

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1 I could comment further or describe further that use.

2 I told him I could. I had catalog material with
3 me and commercials for ColecoVision and other uses
4 as we were talking of the Donkey Kong license,
5 which commercials I showed him after lunch at his
6 request.

7 There was no discussion during the meeting on
8 the merits of a proposal whereby they would invest
9 in Coleco; but we agreed before the meeting was
10 concluded that we would have an opportunity to
11 pursue that further in New York.

12 They expected to be in New York the following
13 week; and they suggested that would be a good time
14 to get together and in subsequent communications
15 after the meeting we did, in fact, make a date to
16 get together.

17 In its broadest sense, those were the matters
18 that we talked about. They also asked a young
19 woman to join us after lunch to talk to us about
20 some of the optical video disc work that they were
21 doing that they thought might make sense to be
22 incorporated educationally as educational software
23 for the ColecoVision system.

24 BY MR. KIRBY:

25 Q Mr. Greenberg, did you have any explicit discussion

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1 during that meeting about the proposal contained in Mr. Kahn's
2 letter to Mr. Adler, Plaintiff's Exhibit 200?

3 A I talked generally about this at lunch. We didn't
4 get back to it. After Mr. Sheinberg raised the subject of
5 King Kong and Donkey Kong, I, for one, was extremely
6 surprised to learn that Universal owned King Kong; and just
7 as importantly, that Universal thought that Donkey Kong and
8 King Kong may have overlapped, or to be more specific, that
9 Donkey Kong may have infringed upon King Kong.

10 He took the position, well, we really ought to
11 resolve this problem before we go any further in talking about
12 a licensing arrangement between Coleco and Universal. By
13 this time we were already after lunch, back in his office
14 looking at the commercials; and he was telling me about their
15 ownership and substantial sums of money that they had
16 invested in the property, defending the property and pursuing
17 the property.

18 Q When you say "the property," are you speaking
19 about King Kong?

20 A King Kong, yes. So, it was as if that were a
21 roadblock interposed by him to further discussion, either on
22 the licensing or, as I mentioned earlier, on the acquisition
23 of an interest in Coleco.

24 Q Did you ask Mr. Sheinberg why he was raising this
25 issue of claiming King Kong was infringed by Donkey Kong at

1 the particular time?

2 A No, I expressed great surprise that he was
3 asserting any rights or claims because I was not aware that
4 there were. I told him that was a matter for the lawyers,
5 and I would certainly contact Coleco counsel and work out
6 whatever was appropriate to work out if, in fact, there was a
7 claim.

8 Q Did you comment in words or substance to the effect
9 that what took you so long to assert this claim?

10 A Well, I indicated my surprise in view of the fact
11 that Mr. Adler knew that we were proceeding with Donkey Kong.
12 Indeed, the whole world at this time knew that we were
13 proceeding with Donkey Kong.

14 Donkey Kong was a hit arcade game for ColecoVision,
15 and a proposed inclusion of the Donkey Kong cartridge had
16 received a great deal of trade publicity. It just seemed
17 incredible to me that if, in fact, Donkey Kong infringed on
18 the property that Universal alleged was theirs, it was so
19 valuable, that they would not assert a claim.

20 I did not throw that assertion at Mr. Sheinberg
21 at that time, but I was very puzzled; and before I said more,
22 I wanted to check with my counsel, which I did immediately.

23 As I matter of fact, I was still at Universal when
24 I called our counsel promptly at the conclusion of the
25 meeting.

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1 Q Mr. Greenberg, was it Mr. Sheinberg himself who
2 first raised the claim that Donkey Kong was an infringement
3 of King Kong to you?

4 A Yes.

5 Q As distinguished from Mr. Wasserman or anyone
6 else?

7 A Yes.

8 Q It was Mr. Sheinberg?

9 A He did it at lunch. He mentioned he talked to
10 Mr. Adler and had seen this Donkey Kong game.

11 Q Prior to Mr. Sheinberg raising that claim had
12 anyone else ever told you that Donkey Kong was an infringement
13 on King Kong?

14 A No.

15 Q Or a possible infringement on King Kong?

16 A No.

17 Q You did testify that you called from Universal
18 your counsel to report on the luncheon?

19 A Yes.

20 Q Who was that that you called?

21 A Michael Schwefel.

22 Q Did you give him an accounting of what transpired
23 at the luncheon?

24 A I did, yes.

25 Q Did you give him any instructions?

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1 A Well, I told him that this is a claim we had to take
2 very seriously; that the reputation of Mr. Sheinberg and
3 Universal was that they were honest, but very tough and
4 very litigious, and they made it very clear they owned the
5 rights to King Kong. I related to him the reference made to
6 me by Mr. Sheinberg concerning succeeding to RKO rights,
7 et cetera.

8 I told Mr. Schwefel that we better immediately
9 investigate the question of whether or not Donkey Kong
10 infringed the King Kong mark, and also to get in touch with
11 Nintendo on this.

12 Q Were you present at a meeting, another meeting,
13 on May 6th in California between and among representatives of
14 Universal, Nintendo and Coleco?

15 A No.

16 Q Had you between April 27th and May 6th had other
17 conversations with Universal representatives including
18 Mr. Sheinberg?

19 A Yes.

20 Q By telephone?

21 A Yes.

22 Q Do you recall approximately how many such
23 conversations you had?

24 A There were probably at least three or four.

25 Q Can you tell me, as best you now recall, the

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1 subject matter of those conversations? 20

2 A The subject matter had to do with the dispute
3 involving Donkey Kong and King Kong. Apparently, very
4 shortly after the meeting on the 27th, a telex communication
5 was sent to Nintendo alleging infringement and threatening
6 suit within 48 hours.

7 I was a little troubled by that because, while I
8 was there, they sought to get names and addresses of me of
9 the Nintendo people; and I thought that was with a view towards
10 sitting down and talking as opposed to threatening.

11 By the time I was back in the East Coast it seems
12 that that telex had already been sent out. We ourselves
13 received a copy in Hartford either on the 28th or 29th of
14 April.

15 There were telephone conversations on the 29th and
16 30th, I believe. Most of them involved Mr. Schwefel, but
17 some of them involved me.

18 Q Did you at any time during the course of those
19 conversations question Mr. Sheinberg about the validity
20 of his claim that Universal owned trademark rights in King
21 King?

22 A No, I think we took that as an article of faith.
23 When I was with Mr. Sheinberg, he was very emphatic
24 that they owned it. He spent some time talking about the
25 history of it and relationship with RKO.

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1 I don't recall whether or not there was a merger
2 or acquisition or litigation, but through some means he made
3 it clear that they succeeded to all the rights that RKO had
4 and indicated since then they had been vigorously defending
5 their rights through litigation, other means, in making
6 investments to enhance and derive benefit from the mark.

7 I didn't question for a moment the accuracy of his
8 representation that he owned it. The only question that I
9 had and Mr. Schwefel had, granted their ownership, did
10 Donkey Kong infringe? That was the question that we were
11 dealing with.

12 Q Did you, during the course of any of these
13 conversations, and if you did, during all of them, make
14 clear to Mr. Sheinberg that you intended to reach a
15 settlement with him?

16 A Oh, yes. From the very first, even the meeting
17 of April 27th, our position was clear; namely, that we would
18 not, indeed we could not, afford to litigate so long as
19 there was a reasonable question that we had to avoid going to
20 war because a litigation or other battle would irreparably
21 injure our marketing plans for the games.

22 Although the basic conflict was between Universal
23 and Nintendo, we made it clear to Sheinberg that we would be
24 suffering in the process and, therefore, we had to settle our
25 interest or protect our interest whether or not Universal was

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1 able to settle with Nintendo.

22

2 Q Now, I'm not sure I understand that answer, Mr.
3 Greenberg. Obviously, any lawsuit has an impact on the
4 Defendant. Did you say anything to Mr. Sheinberg to
5 indicate that there was some particular, peculiar impact
6 that litigation instituted by Universal would have on
7 Coleco?

8 MR. SELTZER: Mr. Kirby, are you focusing
9 just on the April 27th lunch, or on any of the
10 conversations taken as a whole between April 27th
11 and May 6th?

12 MR. KIRBY: At this point I was talking about
13 the telephone conversations after the luncheon
14 and prior to May 6th. I'm perfectly prepared to
15 expand it to include either at the luncheon or in
16 subsequent telephone conversations prior to
17 May 6th.

18 THE WITNESS: Well, both at the luncheon and
19 subsequently we made it clear to Mr. Sheinberg
20 that we were including a Donkey Kong cartridge in
21 our ColecoVision video game. Indeed, the commercial
22 I showed him of the ColecoVision system showed that.

23 We discussed the introduction plans of
24 ColecoVision at that time. We thought we would
25 be shipping this sytem in about 60 days. In fact,

1 the programming had been substantially completed by
2 then.

3 He and Mr. Adler, I know, were aware of the
4 problems a company like Coleco had in introducing
5 a new video system in 1982. Atari was then at the
6 height of its powers, credibility, strength and
7 impact in the marketplace, and so was Mattel.

8 We were the new kid on the block, so-to-speak,
9 trying to break in. We had already had an excru-
10 tiatingly embarrassing and costly problem with
11 a licensee that broke at the Toy Fair in February
12 1982.

13 We had had a verbal agreement, a handshake
14 deal, confirmed by a memorandum of intent, but
15 not legally binding, with a company named Centuri
16 for a number of valuable video licenses, some of
17 which were heavily advertised by us at the Toy
18 Fair.

19 Atari swooped down behind our backs and
20 offered more money to Centuri; and Atari held a
21 very embarrassing press conference at which they
22 disparaged our credibility and made it clear that
23 they had the license.

24 As a result of that incident that was being
25 cast on us as to whether we could really

1 accomplish our plan, introduce this revolutionary
2 new system with what was then the most popular
3 game out, Donkey Kong.

4 So, we were extraordinarily sensitive to the
5 impact of negative publicity which would result,
6 if Universal sued Nintendo -- even if we were not
7 named -- in which the suit charged that Nintendo
8 and, therefore, Coleco had no rights to this
9 property.

10 At that point it was too late to change.
11 We owned no other license which was anywhere near
12 as valuable or as popular as Donkey Kong. No other
13 title of ours was as close to being finished as
14 Donkey Kong.

15 It would have meant, in our opinion, signifi-
16 cantly delaying the introduction of ColecoVision,
17 and introducing it with a far less valuable piece
18 of software.

19 We feared that would have been very detrimental,
20 indeed hindsight proves that that judgment was
21 correct with what, in fact, happened with the
22 video market.

23 We felt -- to try to summarize a long answer --
24 that we had it all on the line; and that we had to
25 make peace with Mr. Sheinberg at any cost.

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1 BY MR. KIRBY:

2 Q I'm not sure, Mr. Greenberg, that the record is
3 clear on this. What portion of what you have just said about
4 Coleco's situation was Mr. Sheinberg or other representatives
5 from Universal aware of, and what is your basis for stating
6 he was aware of this?

7 MR. FAIRHURST: Objection; form. The first
8 part is all right. It's objectionable in form.

9 MR. KIRBY: I'll withdraw the second part.

10 BY MR. KIRBY:

11 Q What was he aware of, and I will follow up --

12 MR. FAIRHURST: I have to object to the
13 first part on the grounds of form. You can ask him
14 what he told him, or what Mr. Sheinberg told him.
15 Mr. Greenberg's knowledge of Mr. Sheinberg's
16 state of mind could only be reflected in a matter of
17 what Mr. Sheinberg said to him.

18 MR. SELTZER: What parts of what you just
19 related in your last long answer do you believe
20 you communicated to Sheinberg or others?

21 MR. KIRBY: No, the question is broader than
22 that.

23 BY MR. KIRBY:

24 Q Not only what you communicated to him, but what he
25 communicated to you. What you know and can testify that he

1 knew.

26

2 A I think I understand the question.

3 First, as to what I specifically communicated in
4 the elements of my last answer, at lunch, in particular,
5 we discussed where Coleco was in video. We talked about when
6 we acquired the Donkey Kong property, and how it related to
7 ColecoVision, its inclusion with the game, and great success
8 we enjoyed at the Toy Fair, the number of orders we had booked
9 since then, and the wisdom of including Donkey Kong with the
10 new video game system to enhance its consumer acceptance.

11 We also referred to the Centuri problem that I
12 testified to, namely, the license that was grabbed away from
13 Atari, I testified to it because, unfortunately, it got a
14 lot of written Toy Fair publicity. The Wall Street Journal
15 covered an extensive account of it. Our stock was
16 significantly impacted, and there was a lot of followup
17 publicity in trade and financial magazines as to whether or
18 not Coleco had overreached and never would deliver its
19 system.

20 In our discussions at lunch he acknowledged that
21 he had seen or heard about it, and I talked at great length
22 about some of those problems, and talked about the unfairness
23 of it.

24 I might also --

25 Q Before you go on, you said he acknowledged that he

1 had seen and heard, what, everything you have said?

2 A Yes, awareness of Coleco, popularity of video
3 games, Coleco's emerging presence, and the problem with
4 Centuri.

5 Q He understood, and from what he said to you, he
6 knew all about that before the luncheon commenced?

7 A Not in the detail that I testified to, but he was
8 familiar with the general fact scenario. I supplied details
9 and context.

10 To continue to answer your question, I know Mr.
11 Kahn had extensive conversations with Steve Adler for a
12 period of months, and brought Steve Adler up to date to
13 precisely where we were going, what the strategy was on
14 ColecoVision, what license property we had obtained.

15 In addition, as I said, Coleco was being
16 extensively covered in the business press, local Los Angeles
17 press, financial press.

18 So, we were a matter of public record. There was
19 nothing that I said, whether it's the popularity or customer
20 acceptance of the system or the importance of Donkey
21 Kong, none of these things were off the record. All of them
22 were a matter of public record.

23 Q Mr. Greenberg, did Mr. Sheinberg or any other
24 representative of Universal urge you to get Nintendo to settle
25 with Universal?

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1 A Mr. Sheinberg urged us to be helpful. In
2 particular, he urged me to be helpful as part of his
3 concluding remarks to me on April 27th. In a telephone
4 conversation that we had on Friday, April 30th, he also
5 urged that we clean the matter up; that I act as a
6 facilitating agent to bring Nintendo to the bargaining
7 table and convince them to table. In any event, that Coleco
8 make peace with Universal or it would be impossible to go
9 forward and discuss the larger issues that Universal and
10 Coleco had to discuss, one, the licensing arrangement for the
11 video, and the item which we were to discuss in New York the
12 following week, namely, Universal taking a financial interest
13 in Coleco.

14 He made it clear that it was really embarrassing
15 to have this problem between the companies and those other
16 issues; but that we would have to clean it up before we
17 could discuss those other issues.

18 Q Mr. Greenberg, did you, in fact, meet with Mr.
19 Sheinberg on May 7th in New York?

20 A Yes.

21 Q Who else was present at that meeting?

22 A Mr. Wasserman, Mr. Sheinberg, I was there from
23 Coleco, and there was a gentleman named Felix Rohayton,
24 a partner in Lazard, Freres, investment bankers to Universal.

25 Q By May 7th had Coleco and Universal reached an

1 understanding with respect to settling the Universal claim on
2 Donkey Kong?

3 A Yes, we had reached a verbal agreement, which was
4 fully defined pursuant to which we took a kind of license
5 I guess you might characterize it, and I think it was
6 subsequently signed about a week later.

7 Q Where was this meeting held?

8 A In New York City at the offices of Lazard, Freres.

9 Q How long did the meeting transpire?

10 A Oh, somewhere between an hour, hour and a half.

11 Q Was the subject of the now settled dispute between
12 Universal and Coleco on Donkey Kong discussed?

13 A Only very briefly, initially.

14 Q By whom?

15 A I don't know who brought it up.

16 Q Did you have anything to say about that subject?

17 A Nothing other than to acknowledge that we thought
18 the problem was now behind us, and we were pleased that it
19 was.

20 Q Do you have any recollection of anything said by
21 any representative of Universal on the subject?

22 A No, not on that subject.

23 Q I take it that your testimony is that you understood
24 that it was a precondition to going forward with the May 7th
25 meeting that the dispute be settled?

1 Chief Executive Officer for several years, yes. At one time
2 that was a shared title.

3 Q With your brother?

4 A That's right. I guess since 1982 I've been the
5 sole Chief Executive Officer.

6 Q Mr. Al Kahn about whom we've heard testimony,
7 reports directly to you?

8 A He did. No longer.

9 Q Who does he report to today?

10 A Brian Clark.

11 Q In 1982 when these meetings with Universal were
12 occurring, Mr. Kahn reported to you directly?

13 A Yes.

14 Q I believe you testified at this meeting with
15 Mr. Sheinberg and others at Universal on the 27th after
16 lunch you showed Mr. Sheinberg some promotional and
17 advertising material, is that correct?

18 A Yes.

19 Q For ColecoVision?

20 A Yes.

21 Q Did you show him any advertising and promotional
22 materials for Donkey Kong cartridges?

23 A Yes.

24 Q Did you show him a television ad for Donkey Kong?

25 A Yes.

1 Q Was that the ad in which there is a gorilla who
2 reaches through the window and pulls the lady across the
3 room?

4 A Yes.

5 Q To your knowledge when was that ad created?

6 A Prior to Toy Fair 1982, and the Toy Fair was
7 mid-February.

8 Q Incidentally, was Mr. Sheinberg the only person
9 to whom you showed that ad after lunch?

10 A I believe Mr. Adler was with us. I don't recall
11 whether Mr. Wasserman was. I believe he was, but I'm not
12 certain; and there may have been other personnel from
13 Universal.

14 Q Now, at the luncheon itself when Mr. Sheinberg
15 was telling you about Universal's history with King Kong, I
16 assume from what you testified to, that he referred to the
17 RKO proceedings in court in 1976?

18 MR. SELTZER: You're asking did Mr. Sheinberg
19 refer specifically to the RKO 1976 litigation?

20 THE WITNESS: My recollection is that he
21 referred to transactions involving RKO, and he
22 spoke for several minutes about them.

23 My recollection is not precise as to whether
24 it was litigation or negotiations or some other kind
25 of activity.

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36
1 THE WITNESS: I had a discussion with Mr.
2 Schwefel. He indicated that their claim was not
3 ironclad. I don't know that he used the term,
4 "weak," but he indicated that there was some
5 question about it.

6 BY MR. FAIRHURST:

7 Q Do you recall whether Mr. Schwefel referred to the
8 Lanham Act in that conversation?

9 A I don't recall.

10 Q I believe you said when Mr. Adler spoke to you
11 prior to April 27th and invited you to come to Universal
12 to talk with him and senior executives at Universal, this
13 excited your curiosity.

14 Could you expand on that? What was excited
15 specifically, if you recall?

16 A What was exciting was the possibility that
17 Universal might want to acquire all or part of Coleco.

18 Q Did that, to use your term, excite you more than
19 the prospect of Universal licensing to Coleco various
20 Universal film properties that could be used for Coleco
21 software?

22 A Yes.

23 Q You were interested in the latter proposition as
24 well, I take it?

25 A Interested in both, but I knew Mr. Kahn could

ably handle the licensing proposition alone.

A As of April 27th when you had this meeting with Mr. Sheinberg, had Coleco already begun to ship tabletop Donkey Kong games to your knowledge?

A I don't believe we had.

Q Do you know whether you had established a price for the trade of the tabletop games by that time?

A Yes.

Q Do you know whether Coleco had also by April 27th established a price for the Coleco cartridge in its ColecoVision form?

A Yes.

Q Had it established a price for --

A I'm sorry.

Q On the Donkey Kong cartridge I'm speaking of.

A Yes, but I should correct my answer. Not in the ColecoVision form because we were not selling that separately.

Q Internally within Coleco you had a price breakdown?

A Oh, yes.

Q Was the hardware as distinct from the software?

A Yes.

Q You knew what your margins were on both of those, is that correct?

A Yes.

1 Q Now speaking only of the Donkey Kong cartridge or
2 cassette, as made to be compatible with the Atari system and
3 Mattel system, I take it you had also established a price
4 for it at that time as well?

5 A Yes.

6 Q These prices were all established before your
7 agreement with Universal of May 14, 1982?

8 A Yes.

9 Q Were these prices changed as a consequence of that
10 agreement to your knowledge?

11 A No.

12 Q Have they ever been changed as a consequence of that
13 agreement?

14 A No.

15 Q There has been testimony, you gave some yourself
16 this morning and Mr. Schwefel yesterday, of the importance
17 of the Donkey Kong cartridge to the success, the introduction
18 success, of the ColecoVision system; and this was one of the
19 major factors, I understand, in your willingness to wish
20 to settle with Universal very quickly.

21 Can we also fairly infer from your testimony that
22 the prospect of going on to do other deals, particularly
23 the possibility of Universal acquiring an interest in
24 Coleco, was a factor in your considerations as to whether
25 to settle quickly or not?

1 A It was a factor, yes.

2 Q It was an important factor?

3 A Not as important as the other factor; namely, that
4 the risks of no settlement and adverse publicity we felt
5 could irreparably injure the success of ColecoVision.

6 Q This was, in large measure, based on your prior
7 unfortunate experience with Centuri?

8 A Centuri and the condition of the industry in the
9 marketplace generally.

10 Q The fact that Coleco was at that point, as you put
11 it, the new boy on the block?

12 A Fighting to try to get in.

13 Q As I understand it, Mr. Sheinberg assured you before
14 this agreement was entered into that Universal would take no
15 precipitous action to interfere with Coleco's Donkey Kong
16 marketing program if a settlement was reached?

17 A If a settlement was reached.

18 Q A settlement was reached, correct?

19 A That's correct.

20 Q Would it be fair to say that Universal took no
21 action against Coleco subsequent to the signing of that
22 agreement?

23 A That is correct.

24 Q Universal has not interfered with in any way
25 your sales of ColecoVision cartridges, is that correct?

1 A That's correct.

2 Q At this luncheon you had with Mr. Sheinberg, as I
3 understand it, you yourself were surprised that Universal
4 or Mr. Sheinberg, to be more precise, was unaware of
5 Coleco's involvement with Donkey Kong, is that correct?

6 MR. KIRBY: Object to the form of the question.

7 MR. FAIRHURST: I accept the objection.

8 Let me see if I can rephrase it.

9 BY MR. FAIRHURST:

10 Q As I understand it, when the subject of Coleco's
11 involvement with Donkey Kong came up, Mr. Sheinberg was then
12 unaware of Coleco's involvement with Donkey Kong, is that
13 correct?

14 A That's not correct.

15 MR. KIRBY: Objection.

16 BY MR. FAIRHURST:

17 Q Your testimony is you believe Mr. Sheinberg was
18 aware that Coleco was involved with the Donkey Kong
19 cartridge?

20 A That is correct.

21 Q What was it that surprised you about that
22 discussion? I believe that was the term you used?

23 A What surprised me was that Universal claimed it
24 owned the King Kong mark, and that Donkey Kong infringed
25 the King Kong mark.

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1 Q You were surprised if that being so, they had not
2 taken action by that time?

3 A Exactly.

4 Q Is that when you asked Mr. Sheinberg, if you did
5 ask him, what has taken you people so long?

6 A I did not put a question precisely in that form.
7 I indicated my surprise, my puzzlement particularly since
8 our ownership of Donkey Kong rights was an old, well
9 publicized, established fact; but I didn't specifically put
10 that precise question to Mr. Sheinberg.

11 Q Can you tell us, Mr. Greenberg, when you personally
12 first became aware, if it is true, that Universal did not have
13 the rights it claimed to have in King Kong?

14 A I'm not certain of the exact time, but it came
15 in conversations with Mr. Schwefel who was telling me about
16 litigation involving Nintendo and Universal on that subject.

17 Q You were given reports periodically, I assume, for
18 Mr. Schwefel?

19 A Yes, from time to time.

20 Q Did he report to you when Judge Sweet's decision
21 granting Nintendo a summary judgment came down?

22 A Yes.

23 Q He reported to you then that that was one of the
24 holdings of the District Court, is that correct?

25 A Yes.

1 Q Was that the occasion in which Coleco began to
2 consider suing Universal?

3 A I don't know. I was not involved in the timing
4 of that decision.

5 Q You authorized the suit, did you not?

6 A Yes, the question was at one point put to me as to
7 whether or not there was any reason why suit shouldn't be
8 started; and I said there was no reason provided we felt
9 there was merit to the suit. There was no corporate or
10 political reason why suit should not be brought.

11 Q That suit had to be approved by you?

12 A That's correct.

13 Q You subsequently gave approval, and the suit was
14 filed, and you're aware of that?

15 A Yes.

16 Q Have you ever seen the complaint in that lawsuit?

17 A I haven't physically examined it.

18 Q What's your understanding of the claim in the
19 lawsuit by Coleco against Universal?

20 A I believe we are alleging that Universal did not,
21 in fact, own the rights which they represented that they
22 owned; and that as a result, we were injured to the
23 extent of the monies that we paid and perhaps more.
24 I'm not certain, in fact, I don't recall at this point in
25 what counts the suit lies, but that's the gravamen of the

1 were no further communications, either written or oral,
2 between Universal and Coleco?

3 A Right about the time that we signed the license
4 agreement I referred to.

5 MR. FAIRHURST: I'd like to have marked as
6 Plaintiff's Exhibit 202 a letter from Mr. Hadl
7 to Mr. Greenberg of July 15, 1982.

8 (Plaintiff's Exhibit 202: Marked for
9 identification - described in index.)

10 BY MR. FAIRHURST:

11 Q I notice Mr. Hadl says, "Pursuant to your request."
12 Do you remember that request put to Mr. Hadl?

13 A I made a request of Mr. Sheinberg when we were
14 together on May 7th that I get some current and historical
15 information of this kind concerning Universal.

16 Q This was, in effect, the followup on the part of
17 Universal to that request?

18 A It appears to be.

19 Q That being so, would that change your testimony in
20 any way as to when you had this conversation with Mr.
21 Rohayton about Universal not being interested in pursuing
22 it?

23 A No, not at all.

24 Q Do you recall whether subsequent to receiving this
25 letter sometime after July 15th you had any further

1 discussions with Mr. Sheinberg or Mr. Hadl, if you ever
2 had any discussions with him on the part of Universal's
3 interest in Coleco?

4 A No.

5 Q There were other meetings that you attended with
6 Universal personnel in this general period on the matter of
7 Coleco acquiring rights to do an E.T. cartridge, correct?

8 A Yes.

9 Q You were a participant in those meetings, some of
10 them?

11 A Yes.

12 Q Do you recall when the first such meeting which you
13 attended was on that subject?

14 A I attended another meeting at Universal City in
15 June 1982. I believe it was sometime between the middle and
16 end of June.

17 Q Was this the meeting in which Mr. Spielberg was
18 present?

19 A Yes.

20 Q Was that the first meeting on the subject, as far
21 as you can recall, that you attended in which there was an
22 interest expressed by Coleco in acquiring rights to E.T.?

23 A It's my recollection that that's the only such
24 meeting I attended concerning E.T.

25 Q Do you have a recollection of attending a meeting

document?

A Yes.

Q Was that a factor in your mind as to whether you received an indemnity from Nintendo or not?

A No.

Q Do you recall what the purpose of securing an indemnity, if one could be secured, from Nintendo was?

A The purpose was really very limited. We were more interested in hearing from Nintendo its response to the threat from Universal. An indemnity really did nothing to cure our problem. An indemnity is just an offer for payment after the fact and after the damage.

We felt that the damage would be irreparable, and any attempt to compensate us would be really coming after the horse was stolen from the barn, so-to-speak.

As I say, our concern was on the front end; namely, the publicity arising from litigation which questioned our rights to Donkey Kong. No indemnity could truly make us whole.

Q What is your understanding of what Coleco received from Universal when it signed the agreement of May 14, 1982?

MR. KIRBY: Objection to the form.

BY MR. FAIRHURST:

Q Do you understand the question?

A I think I do. I believe Coleco received something

1 in the nature of a license agreement. I think the lawyers
2 referred to it as a covenant not to sue; but it almost read
3 like a license agreement to me because we were paying for it,
4 paying royalty based on sales which sounds very much like
5 buying a license right.

6 I believe it also contained the representation that
7 Universal would not sue us.

8 Q Over King Kong?

9 A Yes.

10 Q Did you understand that you were securing whatever
11 rights that Universal had in King Kong as a quid pro quo,
12 if you understand what I mean?

13 MR. KIRBY: Objection. The agreement speaks
14 for itself.

15 MR. SELTZER: Rights with respect to any
16 product that Coleco --

17 MR. FAIRHURST: No, confining my question
18 solely to the Donkey Kong cartridge.

19 Did you understand that Coleco was receiving
20 from Universal whatever rights Universal had
21 in King Kong?

22 MR. KIRBY: Object to the form of the question.

23 MR. FAIRHURST: I understood it's noted.

24 MR. KIRBY: Let me finish what I'm saying.

25 I object to the form of the question. The agreement

1 MR. KIRBY: Object to the form. Go ahead and
2 answer it if you can.

3 THE WITNESS: I wasn't perfectly clear myself
4 as to the extent of the rights. I felt that we
5 were not going to be sued and we, therefore, had a
6 reasonable chance to avoid negative publicity in
7 the event Universal chose to sue Nintendo.

8 BY MR. FAIRHURST:

9 Q Would it be fair to say that your decision to
10 enter into an agreement was largely motivated by commercial
11 considerations on behalf of Coleco overall?

12 A Yes.

13 Q When you went to Universal to meet with Mr.
14 Sheinberg and others on April 27th, you brought with you
15 these Donkey Kong commercials that had already been prepared?
16 What was your purpose in doing that, if you recall?

17 A I thought they would work to Coleco's advantage in
18 showing the people from Universal our skills in merchandising,
19 communicating, getting the essence of a product across in
20 30 seconds.

21 Q Showing them what Coleco could do in the merchan-
22 dising sense?

23 A Yes.

24 Q Did you instruct Mr. Schwefel in conjunction with
25 the agreement entered into with Universal to keep that

1 A No.

MR. SELTZER: Off the record.

(Discussion off the record.)

3
4 BY MR. FAIRHURST:

5 Q Mr. Greenberg, have you ever seen the King Kong
6 game in any of its modes; tabletop, cartridge, cassette or
7 hand-held that Tiger Electronics manufactures and sells?

8 A I don't recall if I did.

9 Q You are aware that there is such a game, or are
10 such games on the market?

11 A Yes.

12 Q Did you receive any reports from anyone as to whether
13 that game is an infringement or could be an infringement
14 of Coleco's Donkey Kong games?

15 A I don't recall if I have received such reports.

16 Q Did you ever ask anyone on your staff, specifically
17 Mr. Schwefel or your marketing people, to look into that
18 possibility?

19 A The subject of those games came up in our
20 negotiations with Universal. I recall a representation that
21 was made by either Mr. Hadl or Mr. Adler that Universal had
22 granted to be recalled or terminated, but I don't know if that
23 has been done.

24 Q They told you it would be recalled or terminated
25 because of the artwork involved with it, do you recall?

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1 A I think it was to be recalled or terminated in 68
2 connection with Tiger as a result of the license agreement
3 that we entered into with Universal.

4 Q Do you recall specifically what you were told on
5 that by Universal other than what you just said?

6 A Yes, I think this was a call Bob Hadl made to my
7 home immediately prior to the May 6, 1982 meeting. It was the
8 evening of May 5th, in which he said that they agreed, as
9 part consideration for our entering into the license which
10 was agreed to the next day, May 6, that it would be recalled.

11 He felt there was nothing to worry about. The
12 company was weak, and perhaps not going forward. That's the
13 last I recall.

14 Q Did you subsequently become aware that Tiger did
15 go on the market with a series of King Kong games?

16 A I believe I did.

17 Q Did you at that point ask why it was so?

18 A I believe I did. I don't know what answer I
19 received.

20 Q You can't recall?

21 A Right.

22 MR. FAIRHURST: Thank you. I have no further
23 questions.
24
25

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1
2 BY MR. KIRBY:

3 Q Mr. Greenberg, the night of May 5th you had a
4 telephone call with Bob Hadl?

5 A Yes.

6 Q At the time of that telephone call had Coleco and
7 Universal agreed on the amount of the royalty that would be
8 paid Universal under the agreement with respect to Donkey
9 Kong that was ultimately reached?

10 A I believe so. I believe the purpose of that call
11 was to confirm the fact that we had an agreement.

12 Q In other words, prior to Mr. Schwefel arriving on
13 the West Coast on the 6th, as between Universal and Coleco,
14 the substantive terms of a settlement agreement had already
15 been reached, is that correct?

16 A I believe I was being told whether or not peace
17 could be made between Universal and Nintendo, and peace would
18 exist between Universal and Coleco.

19 Q Were you aware that Mr. Schwefel and accompanying
20 counsel were going to meet with Mr. Hadl and representatives
21 of Universal privately prior to the time of a meeting with
22 Nintendo on the 6th?

23 A My recollection is that Mr. Schwefel's purpose was
24 to go out there and try to achieve a three-party peace
25 settlement. We were very eager to facilitate a settlement

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1 that involved Nintendo and Universal as well for the simple
2 reason that we feared that the publicity that would surround
3 a suit by Universal against Nintendo might fail to make clear
4 the fact that Coleco was not a party and that Coleco, in fact,
5 had made peace with Universal.

6 So, we had a very selfish interest in desiring to
7 avoid Universal's suit against either party.

8 Q Mr. Greenberg, I take it then it's fair to say
9 based on your last answer, and your previous answer, that you
10 essentially had reached peace with Universal by May 5th at
11 the latest; that the major purpose of the series of meetings
12 that Mr. Schwefel has testified to on May 6th was to somehow
13 work out a three-party arrangement to get Nintendo to settle
14 with Universal, is that correct?

15 A I believe so.

16 Q Now, in response to several questions by Mr.
17 Fairhurst, which you may recall resulted in a flurry of
18 lawyer-like objections and comments, the subject of the
19 rights that Coleco obtained under the agreement which I will
20 call the May 12th agreement because that's the date it was
21 signed, even though we know it was reached prior to that;
22 under that agreement did Coleco use the name, Universal, in
23 any way in connection with its marketing of ColecoVision or
24 Donkey Kong?

25 A I don't recall.

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1 Q Was the word "Universal" placed on the packages in
2 which Donkey Kong was encased?

3 A I don't recall that.

4 Q Was it used in any Media advertising?

5 A I don't recall.

6 Q Did Universal to your knowledge under that
7 agreement give you the right to use its name in connection
8 with promotion, marketing, packaging, et cetera of Donkey Kong
9 or ColecoVision?

10 A I don't recall that.

11 Q Is it fair to say that under that agreement with
12 Universal for payment of the royalty that the only right
13 that Coleco obtained was the right to sell Donkey Kong free
14 of Universal's interference?

15 MR. FAIRHURST: Objection to the word

16 "interference."

17 THE WITNESS: We received that right, at least
18 I don't know if that was the only right we received--
19 it was my understanding that we were buying peace.

20 BY MR. KIRBY:

21 Q To be more specific, and I'll give you a chance to
22 expand on your answer if you wish to, Mr. Greenberg, as a
23 result of that agreement, did Coleco obtain any substantive
24 right from Universal to use Universal's name, distribution
25 channels, marketing expertise, anything from Universal other

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1 than the ability to sell Donkey Kong?

2 A Whether we got any such rights under the agreement,
3 I don't know. I can barely remember the agreement; but I
4 certainly know we never made use of any assistance or
5 marketing power or distribution or advice or knowhow from
6 Universal. There was never any assistance.

7 Q I know it's unfair to test you without putting in
8 front of you the written agreement. During the period
9 April 27th through May 5th when at the latest the oral
10 agreement was consummated with Universal, you were personally
11 party to a number of discussions with respect to Universal's
12 claim?

13 MR. SELTZER: Conversations with Universal?

14 BY MR. KIRBY:

15 Q Conversations you had with representatives of
16 Universal during that period?

17 A I was occasionally involved on the phone.

18 Q During the course of any of those conversations
19 did Universal offer as part of the settlement to allow
20 Coleco to use Universal's expertise, its name, its marketing
21 channels or anything that Universal had available to it with
22 respect to selling Donkey Kong?

23 A No, that never came up.

24 Q Did Coleco ever ask, as part of that settlement,
25 for anything from Universal relating to any asset or ability

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1 of Universal for marketing or selling Donkey Kong?

2 A None whatsoever.

3 Q Mr. Greenberg, in response to one of Mr. Fairhurst's
4 questions you stated that as a result of the agreement with
5 Universal, Coleco's payment of royalties to Nintendo was not
6 affected, is that correct? Do you recall that was your
7 testimony? I'm simply trying to state your testimony.

8 A Could you repeat your question?

9 Q My recollection of your testimony is in response
10 to a question by Mr. Fairhurst, which I want to go and
11 follow up on, you testified that the Coleco-Universal
12 agreement did not affect Coleco's payment of royalties to
13 Nintendo for selling Donkey Kong?

14 A That is correct.

15 Q Do I understand by that testimony that you mean
16 that you did not suspend or reduce or otherwise alter the
17 payments that you were obligated by contract to make to
18 Nintendo?

19 A That is correct.

20 Q Did you also mean by that that the profits that
21 Coleco made were not affected by the Coleco-Universal
22 agreement?

23 A No, I did not mean that.

24 Q Indeed, the monies that you paid to Universal did
25 have an impact on the profits you made for selling Donkey Kong,

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